

**Matter of Levi v New York State Workers
Compensation Bd.**

2021 NY Slip Op 33696(U)

September 9, 2021

Supreme Court, Albany County

Docket Number: Index No. 903714-21

Judge: George R. Bartlett III

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This opinion is uncorrected and not selected for official publication.

BACKGROUND

Petitioner is a chiropractor licensed in 1987 to practice in New York State. In 1988, petitioner was authorized by the Workers' Compensation Board to render treatment for workers compensation patients.

On or about January 27, 2020, petitioner received a notice from the WCB to provide documents and information relating to business dealing with durable medical equipment (DME) suppliers, specifically Elite Medical Supply. On February 26, 2020, petitioner responded by providing the requested documentation and information to respondent. Thereafter on April 12, 2021 respondent issued a letter announcing the Board's intent to remove petitioner from the list of authorized providers to treat injured workers as of May 4, 2021. In the alternative, petitioner was given the option to resign on or before that date.

Respondent contends that under Workers' Compensation Law and regulations, an authorized provider is prohibited from receiving any third-party payment for prescribing DME, irregardless of whether it is necessary or appropriate. Petitioner does not deny accepting payments in connection with DME suppliers. Petitioner does however challenge whether the applicable statute applied to him at the time of respondent's investigation and determination.

DISCUSSION

The WCB administers New York State Workers Compensation Law (WCL) and insures that injured employees receive appropriate medical treatment, by authorized

providers only (WCL §13-b[1]). Authorized medical providers must observe and follow the WCL and its corresponding regulations. As applicable here, authorized medical providers must follow certain fee schedules for payment, allow the Board to investigate any claims and revoke a provider's authorization to treat workers compensation patients as may be necessary. (*see generally*, WCL Article 2; 12 NYCRR §348.2; 12 NYCRR §442.2).

In New York State, employers are required to purchase workers compensation insurance, covering injuries to employees that occur in the course of their employment. When making a workers compensation claim, employees are limited to seeing medical providers that are authorized by the Worker's Compensation Board. WCL prescribes that only the insurance carriers may pay the medical providers and such providers are prohibited from seeking third-party payment in their care of the employee-patients. (*see*, WCL §§13-d[2][g]; 13-f).

In relevant part, WCL §13-d(2) states,

"The [Board] Chair shall remove from the list of *physicians (providers)* authorized to render medical care under this chapter, or to conduct independent medical examinations in accordance with paragraph (b) of subdivision four of section thirteen-a of this article, the name of any *physician (provider)* who he or she shall find after reasonable investigation is disqualified because such *physician (provider)*:

(g) has directly or indirectly requested, received or participated in the division, transference, assignment, rebating, splitting or refunding of a fee for, or **has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing**

of medical or surgical care, an independent medical examination, diagnosis or treatment or service, including X-ray examination and treatment, **or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, X-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equipment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies, or any other goods, services or supplies prescribed for medical diagnosis, care or treatment, under this chapter....**

(Emphasis added; WCL §13-d[2][g]²).

On January 10, 2018, petitioner entered into a services agreement with Elite Medical Supply (Elite). The agreement provided that when a patient needed DME equipment provided by Elite, petitioner directly provided such service to the patient rather than someone from Elite providing the service. Petitioner provided services, including:

“(a) assist Elite in providing information required to facilitate its collection on claims for prescribed products; (b) obtain and communicate patient measurements to Elite; (c) provide patient fittings; (d) educate and instruct the patient on proper use and care of the product; and (e) confirm proper fittings, instructions, etc. with patient.”

(Affidavit of David Levi, ¶12).

Petitioner contends these services would have been otherwise performed by someone from Elite, so, for nominal compensation he performed the duties as their chiropractor. Petitioner was paid by Elite based on a services fee schedule.

² The Court purposefully wrote the italic emphasis in WCL §13-d with “physicians”. The Legislature changed the wording to “providers” which went into effect on January 1, 2021. As a chiropractor does not have a medical degree, petitioner argues that the statute did not apply to him prior to January 1, 2021.

Petitioner argues that WCL §13-d did not apply to him prior to January 1, 2021 because the statute specifically stated “physician.” It was not until January 1, 2021 that the legislature changed the wording to “provider”.

Petitioner concedes that he did accept payments from Elite, however argues that all payments were prior to January 1, 2021 and for the legitimate purpose of assisting his patients with the process of obtaining and using the equipment, which is something Elite would have done. Petitioner indicates that this is a very common practice between chiropractors and DME suppliers, however does not provide any other doctors’ names or evidence to support this. Ultimately, petitioner stands on his argument that he received *no* money after January 1, 2021 when the wording of WCL §13-d changed to “providers.”

In a recent decision, the Schenectady County Supreme Court addressed this very issue,

“The Board’s reliance on the statutory amendment of the WCL, effective January 2020, which altered the term “physicians” to “providers,” but was subsequent to the investigation herein, does not cause this Court to find the Board to have exceeded its jurisdiction. Moreover, WCL §13-1, which applies exclusively to chiropractors, also vests the Board with removal authority.

The intent of the statutory amendment, espoused during the 2019 legislative session, was to extend the board’s authority to resolve medical bill disputes and simplify the process...”

Thus, the Board’s application of WCL §13-d was not improper merely because petitioner’s alleged disqualifying conduct antedated amendment of the statute.

In short, the statute prohibited the same conduct and afforded the same procedural process for the removal of authorized providers both

before and after amendment.

(Cerniglia v. New York State Worker's Compensation Bd., et al., Schenectady County Supreme Ct., Index #2020-324, filed 05/07/2021; internal quotations and citations omitted).

In addition, petitioner asserts that he was deprived a hearing prior to the determination of the Board. New York Courts have long held that a practitioner's authorization to treat WCL claimants is a privilege and not a right, thereby not requiring a hearing prior to revocation of their authority. (*see, Siddiqui v. Commissioner, New York State Dept. Of Social Services*, 170 A.D.2d 922 [1991]; *Matter of Bora v. New York State Dept. of Social Services*, 152 A.D.2d 10 [1989]; *Schaubman v. Blum*, 49 N.Y.2d 375 [1980]).

Turning to the Board's determination, "[i]n reviewing an administrative determination, Courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. Deference is generally accorded to an administrative agency's interpretation of statutes it enforces when the interpretation involves some type of specialized knowledge." (*Matzell v. Annucci*, 183 A.D.3d 1 [2020]; *see also, Liguori v. Beloten*, 76 A.D.3d 1156 [2010]).

The administrative determination by respondent further references WCL §13-1, which specifically handles care and treatment of injured employees by duly licensed *chiropractors*. (Emphasis added). This varies from the previously discussed section (WCL §13-d) which addressed *all authorized providers*. (Emphasis added). Under WCL §13-1, chiropractors have not been permitted to accept third-party payment and were

subject to removal, as an authorized provider, if they did so. Irregardless of the changes to WCL §13-d, this provision stands.

The Court finds that there was a rational basis taken by the Board and that they were within their statutory right to do so. Specialized knowledge is not required for the applicable statutes to be interpreted.

“Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law. Stated another way, the penalty imposed must be upheld unless it is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness. In assessing the penalty, the reviewing court may neither second-guess the administrative agency nor substitute its own judgment for the action taken.”

Liguori v. Beloten, 76 A.D.3d 1156 [2010], *internal quotations and citations omitted*).

Upon this Court’s review of the Board’s determination and the record presented, the Court finds that the penalty imposed is not an abuse of discretion as a matter of law nor find that the Board acted arbitrary and capricious.

Petitioner’s remaining contentions, including his due process and constitutional claims, have been examined and are found to be lacking in merit.

The decision of the Board is confirmed. This is the decision of the Court.

Dated: SEPT 9, 2021
Schoharie, New York

SO ORDERED.



HON. GEORGE R. BARTLETT, III
Acting Supreme Court Judge



09/14/2021